84-441 (1)

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IN THE SUPREME COURT
OF THE UNITED STATES

October Term, 1985
No. 85-

HANSENS' INC., Doing Business as Champion Industrial Contractors,

Respondent,

vs.

AGRI-FEEDS, INC., et al.,

Petitioners,

PETITION FOR WRIT OF CERTIORARI TO THE CALIFORNIA SUPREME COURT

DOUGLAS P. GRIM
Member of the Bar
of the
United States Supreme Court
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J.GALLAGHER - Printed Briefs (714) 685-3637

18pp

Question Presented

DOES AN APPEAL LIE FROM A TRIAL COURT'S DENIAL OF A MOTION TO CONSOLIDATE WHERE NO SEPARATE AND INDEPENDENT CAUSES OF ACTION REMAIN BEFORE THE TRIAL COURT?

CERTIFICATION AS TO INTERESTED PARTIES

Counsel for the Petitioner hereby certifies that there are no other parties of interest in the case at bar except those listed in the caption and their attorneys of record. These representations are made to enable judges of the court to evaluate possible disqualifications or recusal.

_____

DOUGLAS P. GRIM

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IN THE SUPREME COURT
OF THE UNITED STATES

October Term, 1984
No. 84-

HANSENS' INC., Doing Business as Champion Industrial Contractors,

Respondent,

vs.

AGRI-FEEDS, INC., et al.,

Petitioners,

PETITION FOR WRIT OF CERTIORARI
TO THE CALIFORNIA SUPREME COURT

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Petitioners pray that a Writ of Certiorari issue to review the judgment of the California Supreme Court entered in the above case on June 13, 1984.

Opinions of the Court Below

The opinion of the Court of Appeal of the State of California in and for the Third Appellate District is printed in

Appendix B hereto. The Judgment of the California Supreme Court is printed in Appendix A hereto.

Jurisdiction

The Judgment of the California Supreme Court was entered on June 13, 1984. This Petition is filed within 90 days of that Judgment. The jurisdiction of this court is invoked under 28 U.S.C.

Statement of the Case

The Complaint herein was filed on July 14, 1983, purporting to sue to enforce a mechanics lien. An answer was filed on or about September 17, 1983, on behalf of appellants. The trial court proceeding herein was conducted under Case No. 171446 of the San Joaquin County Superior Court.

Prior to July 14, 1983, the date of filing of the instant Complaint, the Municipal Court of California, County of San Joaquin, Manteca-Ripon-Escalon-Tracy Judicial District, ordered the consolidation of municipal court cases numbered 346613 and 346647, as more particularly related within the Notice of Ruling filed in that court of which this court can take judicial notice. Those two cases, and each of them, also involve mechanic liens pertaining to the same real property as to which the instant case relates. After so consolidating case nos. 346613 and 346647, the same municipal court ordered said consolidated matter to be further consolidated with case no. 356746, yet another

mechanic lien action pertaining to the same real property to which the instant case relates. Subsequent to the filing of the Complaint herein, the municipal court ordered the transfer of case no. 346647 and those other matters theretofore consolidated with said case to the San Joaquin County Superior Court and the Notice of Transmittal was filed and served on or about December 14, 1983. The aforementioned consolidated suit, bearing San Joaquin County Superior Court Case No. 174171, together with yet another San Joaquin County Superior Court Case No. 168537, involved mechanic lien foreclosure suits against the same parcel of real property as does the Complaint in this case, being San Joaquin County Superior Court Case No. 171446.

On or about January 12, 1984, a trial date was set for this case on March 1, 1984. On February 10, 1984, the Motion for Consolidation of Actions and Stay of Trial was filed to consolidate the case herein with the previously consolidated municpal court cases, now numbered superior court case no. 174171, and with case no. 168537. All three cases involved a mechanics lien claim pertaining to the same piece of real property, the same construction project, the same engineer, the same general contractor, the same issues of fact, and the same issues of law. Hearing was had on the Motion to Consolidate on February 29, 1984, before the Honorable Frank Grande, Judge, and the court at that time denied the Motion to Consolidate. Still later the same day, February 29, 1984, a Notice of Appeal from the Order Denying Consolidation was filed with the

Court of Appeal for the Third Appellate District. On March 1, 1984, the automatic stay was disregarded by the Superior Court in and for the County of San Joaquin, the Honorable Frank Grande, Judge Presiding, and trial was had. On April 16, 1984, the appeal was dismissed by the Court of Appeal for the Third Appellate District. On May 17, 1984, the San Joaquin County Superior Court Case Nos. 168537 and 174171 were resolved by stipulation on the record in the Superior Court in and for the County of San Joaquin. No such stipulation was available as to the instant case for reason of the order of the San Joaquin County Superior Court of February 29, 1984, denying the motion to consolidate this case with case nos. 168537 and 174171 which cases, and each of them, are now resolved.

Reasons for Granting the Writ

The denial of a motion consolidating actions constitutes a final judgment subject to appeal where no separate or independent causes of action remain before the trial court.

This appeal raises the question whether an order denying consolidation is immediately appealable under the finality rule now embodied in C.C.P. § 904.1, as relaxed by the 1968 reorganization and changes to the provisions of old C.C.P. § 963.

It was held under the old C.C.P. § 963 that an order of consolidation was not immediately appealable under the then statute. In **State Farm Mutual Auto Ins. Co. v. Superior Court of San Francisco** (1956), 47 Cal.2d

428, 304 P.2d 13, it was recognized that an order of consolidation was not appealable under a then applicable statute specifying that an appeal could be taken from a final judgment of a superior court.

In 1968, the legislature reorganized and changed the new C.C.P. § § 904-904.5 with the intention to clarify the law regulating when appeals could be taken. In particular, the phrase, "judgment other than an interlocutory judgment", was substituted for "final judgment" to describe more accurately the rule applying to appeals in various situations. See, CEB, 1968 Code Legislation, pages 71 and 72.

Code of Civil Procedure § 904.1 in part provides that an appeal may be taken from a judgment entered in an action, except for an interlocutory judgment. The question therefore becomes what constitutes an interlocutory judgment, or, alternatively, what constitutes an appealable "final judgment". Some early decisions have stated that "one final judgment" rule as holding that a judgment is final only when it terminates all litigation between the parties on the merits of the case, and that there cannot be separate judgment on one count in a complaint containing several counts. **Bank of America v. Superior Court** (1942) 20 Cal.2d 697, 701-02, 128 P.2d 357.

As Witkin observes, however, this simple statement of the one final judgment rule may confuse rather than aid analysis in a more complex case:

> "Keeping these [definitional] matters in mind should . . .assure the aggrieved party of a timely

appeal for a simple appealable judgment **in an action involving no severable interests.** But in complicated cases the one final judgment rule proves to be a delusion, and appeals from separate final judgment in a single action continue to present the most difficult problems in the field of appellate procedure."

6 Witkin, California Procedure 4052 (2nd Ed. 1971).

[Emphasis added.]

In recognition of this fact, courts have progressively formulated various exceptions to the one final judgment rule. For example, a judgment which resolves all issues as to one party is final as to that party. **Aetna Cas. Etc. Co. v. Pacific Gas and Electric Co.** (1953) 41 Cal.2d 785, 788, 264 P.2d 5; **Justus v. Atchison** (1977) 19 Cal.3d 564, 568, 139 Cal.Rptr. 97. The one final judgment rule likewise does not apply where the trial court's failure to dispose of all causes of action can be cured by amendment of the judgment by the appellate court. This approach is frankly utilitarian; intended to prevent unnecessary delay caused by strict application of the one final judgment doctrine, it has become "routine" in its application. **Tenhet v. Boswell** (1976) 18 Cal.3d 150, 154, 133 Cal.Rptr. 10.

The question continues to be whether the order appealed from is appealable. Code of Civil Procedure § 1048, providing for consolidation, does not address this issue. For all practical purposes, the order appealed from constitutes a final determination that defendants are entitled to

no relief. The matter went to trial notwithstanding the appeal from the order denying consolidation. There are no pending separate claims for relief. Had the superior court ruled otherwise, this matter might well now be resolved. This court can take judicial notice of the fact that the cases that would have been consolidated with the case at bar but for the erroneous ruling of the superior court were resolved by stipulation in open court on Thursday, May 17, 1984, in the Superior Court in and for the County of San Joaquin. Those cases, as does the case at bar, involve a mechanics lien claim pertaining to the same piece of real property, the same construction project, the same engineer, the same general contractor, the same issues of fact, and the same issues of law. The superior court should have consolidated this action with the remaining litigation, and, having failed to do so, trial was had. Defendants were effectively deprived of their constitutional right to trial for failure of the superior court to recognize the appeal from the order denying consolidation. Even assuming for purposes of argument that defendants were not deprived of their constitutional right to trial by the refusal of the superior court to recognize the appeal from the order denying consolidation, the application of the superior court's refusal to the facts of this case unconstitutionally deprived defendants from the due process of law otherwise afforded defendants by the constitution of the United States of America.

Conclusion

The writ of certiorari should be granted.

Petitioners herein have been denied the precious right to their day in court. The action of the trial court was taken upon a record totally devoid of evidence. All constitutional limitations recognized by this court were disregarded by the lower courts in this case. Justice compels that the judgment be vacated and the case remanded in order to proceed to trial.

Respectfully submitted,

Douglas P. Grim
Attorney for Petitioner

STATEMENT OF RELATED CASES

Pursuant to Rules of the United States Supreme Court, Petitioner knows of no cases that are related to this appeal which are now pending before this court.

DATED: September 10, 1984.

_____

Douglas P. Grim

EXHIBIT "A"

CLERK'S OFFICE, SUPREME COURT
4250 STATE BUILDING
SAN FRANCISCO, CALIFORNIA 94102

JUN 13 1984

I have this day filed Order_____

HEARING DENIED

In re: 3 Civ. No. 23800

HANSEN'S INC.

vs.

AGRI-FEEDS, INC., et al.

Respectfully,

Clerk

877 8-82 4M*OSP

EXHIBIT "B"

IN THE COURT OF APPEAL
STATE OF CALIFORNIA
IN AND FOR THE
THIRD APPELLATE DISTRICT

HANSENS' INC.

vs.

AGRI-FEEDS, INC.

By the Court:

The court having examined the notice of appeal and appellant's settlement conference statement and it appearing that the appeal is from a non-appealable order, it is ordered that the appeal filed February 29, 1984, is dismissed.

Dated: April 12, 1984

Regan, Action P. J.

PROOF OF SERVICE

STATE OF CALIFORNIA)
) ss:
COUNTY OF RIVERSIDE)

I am a citizen of the United States and a resident of the County aforesaid; I am over the age of eighteen years and not a party to the within entitled action; my business address is 4075 Agate Street, Riverside, California 92509.

On September 11, 1984, I served the within PETITION FOR WRIT OF CERTIORARI on the interested parties in said action, by placing a true copy in each of four(4) sealed envelopes, with postage thereon fully prepaid, in the United States mail at San Bernardino, California, addressed as follows:

Law Office of Champion & Walker
419 Tully Road
Modesto, CA 95352

San Joaquin County Clerk
Courthouse
Stockton, CA 956201

California Supreme Court
3580 Wilshire Blvd., Room 213
Los Angeles, California 90010

Clerk, Court of Appeal
914 Capitol Mall
119 Library & Court Bldg.
Sacramento, CA. 95814

I certify under penalty of perjury that the foregoing is true and correct.

EXECUTED on September 11, 1984, at Riverside, California.

JACK GALLAGHER